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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ANATOLY KADOSHNIKOV, Defendant and Appellant.	C061634 (Super. Ct. No. CR061624)

Convicted of two counts of committing a lewd or lascivious act on a child under 14 years of age and sentenced to eight years in prison, defendant Anatoly Kadoshnikov contends on appeal the trial court abused its discretion in admitting evidence of a prior uncharged offense. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Charged Offenses

The minor victim (minor) was six years old when she met defendant. Her mother was dating defendant at the time.

During the time defendant dated minor's mother, defendant would go over to minor's house, where she and her family lived, and spend the night. On the nights defendant stayed over, he slept in the same bed as minor and her mother; minor's mother slept in the middle with minor and defendant sleeping on either side of her.

In the mornings, after defendant spent the night and minor's mother was in the kitchen, defendant touched minor sexually on three different occasions. During these occurrences, he put his hands in her underwear, touched her vagina, and put his finger inside her. On the third occasion, defendant grabbed minor's leg and hit her when she refused his request to go to him. Minor's mother came in the room that time because she heard minor's cry, and defendant "smiled like he was playing around." The incidents occurred over a period of a few weeks. Minor's mother and defendant ended their relationship about a month after the incidents.

Minor did not tell anyone about the molestation until she told her sister, Oksana, nine years later. Defendant was charged with two counts of committing a lewd or lascivious act on a child under age 14.

B

The Uncharged Offense

A. is defendant's 23-year-old daughter. At trial, she testified defendant molested her when she was 12 or 13 years old for a period of four to five years. Defendant would touch her breasts over and under her clothes and suck on her breasts. He

also would put his hands in her underwear and touch her vagina while touching himself. At the time, A. would sleep in the same bed as defendant, and he would always put her on his lap.

In addition to the sexual abuse, A. also testified that defendant physically and psychologically abused her. Defendant would beat her, slap her, and use his palm to hit her nose. A. further testified that defendant told her that her mother was a prostitute and was dead, and he continuously refused to give her the documentation she needed to get her United States citizenship.

At around 15 years old, A. moved out of defendant's house and moved in with a friend. A. did not tell anyone about the molestation until she told the friend she lived with at the time. When A. was 17 years old, she contacted Child Protective Services regarding her molestation because defendant wanted her to move back in with him. She was afraid defendant would physically hurt her again, and she wanted to get emancipated so she could get married and go to school. A. was subsequently referred to the Sacramento County Sheriff's Department where Detective Kathryn Dewante investigated her molestation allegations. Detective Dewante asked A. to make a pretext phone call to defendant. But A. never made the call, and her case was closed for lack of corroboration or other evidence indicating the alleged acts actually occurred.

In his in limine motions, the prosecutor moved to admit the evidence of defendant's prior uncharged sexual acts with A.

under Evidence Code[1] section 1108. Defendant opposed the motion on the ground the evidence should be excluded under section 352. Specifically, defendant argued, "the evidence is of limited probative value, is likely to confuse issues and will cause an undue consumption of time."

During the hearing on the in limine motions, both the prosecutor and defense counsel submitted the issue on the briefs. The trial court admitted the uncharged sex offense evidence involving A. stating:

"The [section] 352 issue, obviously, if the jury believes the [section] 1108 evidence, then it would be evidence that could be quite prejudicial. But it's the type of prejudice that comes from it having probative value. If it doesn't have probative value, then if the jury thought it didn't prove anything, then of course there wouldn't be any prejudice to it either. So it's not that type of prejudice, which goes to other issues."

"Same thing with there being undue consumption of time or probability of confusion. Those don't really enter into it either. None of the [section] 352 issues come up in such a level that they substantially outweigh the probative value. So I'll allow it in."

Defendant did not object to A.'s testimony during the trial.

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[1] All further undesignated statutory references are to the Evidence Code.

DISCUSSION

I

Admission Of Molestation Evidence

On appeal, defendant contends the trial court abused its discretion in admitting evidence of A.'s allegations of molestation against defendant. We disagree.

Section 1108, subdivision (a), provides, "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 352, in turn, provides, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In evaluating the probative value of other sex offense evidence under section 352, courts look to the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the extent the other offense evidence came from independent sources. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917; *People v. Branch* (2001) 91 Cal.App.4th 274, 285-286.) Courts must then balance the probative value of the evidence against its prejudicial effect under four factors: (1) the inflammatory nature of the evidence; (2) the probability of confusing the jury; (3) the

remoteness of the prior offense; and (4) the amount of time consumed in introducing and refuting the evidence (the *Harris* factors). (*People v. Harris* (1998) 60 Cal.App.4th 727, 737-741.) We will not disturb a trial court's exercise of discretion under section 352 unless it is shown the trial court exercised it "'"in an arbitrary, capricious or patently absurd manner."'" (*People v. Frye* (1998) 18 Cal.4th 894, 948.)

A

The Evidence Of Defendant's Uncharged Molestation Had Substantial Probative Value

The evidence of defendant's uncharged molestation of A. had substantial probative value to the charged offenses. Defendant argues that "there was little similarity between [A.]'s specific molestation allegations and those of [minor]." On the contrary, the molestations of minor and A. were significantly similar. Both victims were young girls at the time of the molestation. In both cases, the victims knew defendant, and defendant occupied a position of authority and trust with the girls. Defendant also slept in the same bed as the victims during the time of the molestations. Moreover, the nature of the sexual acts was similar for both victims in that defendant put his hands in their underwear and touched their vaginas.

Defendant further contends the "nature of the alleged attraction [between the two victims] was completely different" because minor was six years old at the time of her alleged molestation in contrast to A., who was 12 or 13 years old and "'beginning to mature'" when her alleged molestation began.

This contention is without merit. While some dissimilarities between the two alleged molestations exist, the two offenses "need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101" in order to admit evidence of the uncharged offense. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) "It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*Frazier*, at pp. 40-41.) Here, although the nature of the two molestations is not identical, they constitute sex offenses under section 1108.

Moreover, the alleged molestations of A. and minor occurred relatively close in time. Minor was molested in 1996, and A.'s molestation started in 1998. The probative value of the uncharged molestation evidence is also enhanced because the evidence came from independent sources. Minor and A. both testified that A. never told minor that defendant touched her sexually. A. also testified that she had never told anyone in minor's family about her molestation, and minor never told her that defendant had molested her. In addition, A. spoke with the police regarding her molestation approximately four or five years prior to the current trial, and she was first contacted regarding this case a year before trial. Thus, the uncharged offense was substantially similar to the charged offense, the charged and uncharged offenses occurred close in time, and the uncharged offense evidence came from independent sources; as such, the uncharged molestation evidence was highly probative.

B

The Uncharged Offense Evidence Was Not Unduly Prejudicial

We now balance the probative value of the uncharged offense evidence against its prejudicial effect under the *Harris* factors. Defendant would have us find an abuse of discretion based on our opinion in *People v. Harris*, *supra*, 60 Cal.App.4th at page 727. Specifically, defendant claims that this case "clearly raises all the red flags identified in *Harris*." Defendant's reliance on *Harris* is misplaced because *Harris* bears little resemblance to the case at hand.

In *Harris*, the prosecution introduced evidence that the defendant had brutally raped a young woman 23 years before the commission of the charged offenses. (*People v. Harris*, *supra*, 60 Cal.App.4th at pp. 733-734.) The defendant in that case had led an unblemished life since his release on parole, and at the time of trial he was 52 years old and a mental health nurse. A jury found him guilty of several sexual offenses involving two patients. This court wrote, "[t]he charged crimes involving a breach of trust and the 'taking advantage' of two emotionally and physically vulnerable women are of a significantly different nature and quality than the violent and perverse attack on a stranger that was described to the jury." (*Id.* at pp. 730-733, 738, 739.) Thus, we reversed the judgment because the prior offense evidence was "remote, inflammatory and nearly irrelevant and likely to confuse the jury." (*Id.* at p. 741.)

1. *The Uncharged Offense Evidence Was Not More Inflammatory Than The Charged Offense*

Defendant contends the evidence of A.'s allegations were highly inflammatory. This contention is without merit. In determining whether the uncharged offense is more inflammatory than the charged offense, the uncharged offense evidence must be "no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Here, the alleged inflammatory nature of the prior uncharged molestation involving A. is completely distinguishable from the circumstances in *Harris*. The prior and charged offenses discussed in *Harris* were significantly different in nature and quality. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 738.) The *Harris* prior offense involved "a viciously beaten and bloody victim," in contrast to the charged offenses that at worst involved defendant licking and fondling an "incapacitated woman and a former sexual partner." (*Ibid.*) Further, the jury in that case heard an incomplete and distorted description of the prior offense. Thus, this court, in *Harris*, concluded the prior offense evidence was "inflammatory *in the extreme*." (*Ibid.*)

The molestations of A. and minor were substantially similar in that both victims were young girls at the time of the molestations, and defendant molested them by inserting his hands into their underwear and touching their vaginas. Additionally, in contrast to *Harris*, both the uncharged and charged offenses

here involved defendant molesting a child while he was in a position of authority and trust, and the jury received an accurate depiction of the alleged uncharged acts from A. and Detective Dewante. Consequently, we find the evidence of A.'s molestation was no more inflammatory than the evidence of the charged molestation, and such evidence was clearly not "inflammatory *in the extreme*" as in *Harris*.

Defendant also contends that A.'s testimony of being physically and psychologically abused by defendant rendered the evidence highly inflammatory. As explained below, since this claim was not preserved for appeal, we will not address it.

2. *The Uncharged Offense Evidence Did Not Likely Confuse The Jury*

Defendant contends the prosecutor's use and focus on A.'s molestation confused the jury because it urged the jury to convict defendant for the prior uncharged offense. We disagree.

We note the prejudicial effect of the uncharged offense evidence does heighten when the uncharged offense did not result in a criminal conviction. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) In these circumstances, "the jury might have been inclined to punish defendant for the uncharged offenses . . . and increased the likelihood of 'confusing the issues' (citation), because the jury had to determine whether the uncharged offenses had occurred." (*Ibid.*) Here, Detective Dewante, who interviewed A. regarding her molestation, testified that A.'s case was closed due to lack of corroboration. Therefore, the jury was aware defendant was not convicted for

molesting A., and it is plausible the jury might have wanted to punish defendant for the prior uncharged molestation of A.

Nonetheless, we find nothing in this record to suggest the admission of the uncharged offense evidence confused the jury. Here, the risk of confusion was counterbalanced by the jury instructions on reasonable doubt, elements of the charged offenses, and the proper burden of proof for the uncharged offense. The trial court further instructed the jury that "[i]f you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence." Moreover, the only jury questions or requests during deliberations involved the charged offense and minor's testimony. Thus, we "presume the jury adhered to the admonitions" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1277), and, on this record, we conclude the jury was not likely confused by the admission of the uncharged molestation evidence.

3. *The Presentation Of The Uncharged Offense Evidence Did Not Consume An Undue Amount of Time*

Finally, we look to the potential undue consumption of time in presenting this evidence. Defendant contends that "there was manifestly an undue consumption of time," and "the other acts testimony completely overwhelmed the underlying case." We find defendant's contention unavailing. We review the trial court's discretion at the time the objection was made and will not consider any subsequent matters that were not objected to at trial. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1070,

overruled on another ground in *People v Hill* (1998) 17 Cal.4th 800, 822-823.)

In his in limine motion, defendant argued that the prior offense evidence would "take away from the act at issue in this trial as there will be significant argument and examination of the witnesses due to the very weak nature of the evidence" against defendant, and the jury would "spend a significant portion of time debating the evidence of the prior." During the hearing on in limine motions, the trial court considered the possibility of undue consumption of time resulting from the admission of the prior uncharged molestation evidence in its section 352 analysis and concluded that undue consumption of time and other section 352 issues did not "come up in such a level that they substantially outweigh the probative value." Thus, the trial court explicitly considered and rejected the possibility of undue consumption of time.

Further, A.'s testimony took up 68 pages of the 577-page reporter's transcript (direct, 34 pages; cross, 32 pages; redirect, 1 page; and recross, 1 page). Detective Dewante also testified to her investigation of A.'s allegations, which took up approximately 17 pages of the reporter's transcript (direct, 7 pages; cross-examination, 7 pages; redirect, 2 pages; and recross, 1 page). Due to the high probative value of the evidence, we cannot conclude the evidence of the uncharged molestation allegations consumed a significant amount of time as to constitute an undue consumption of time. The trial court committed no error.

After reviewing all the factors, we conclude the trial court did not act in an arbitrary, capricious, or patently absurd manner. Thus, the trial court did not abuse its discretion in admitting evidence of defendant's uncharged sex offense involving A.

II

Evidence Of Physical And Psychological Abuse

Section 353 provides, "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless" an objection or a motion was timely made. It is important the objection "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Further, "[a] reviewing court 'focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters . . . .'" (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1070.)

Defendant argues for the first time on appeal that A.'s testimony regarding defendant's physical and psychological abuse was highly inflammatory. According to defendant, A.'s testimony painted him "as violent and vindictive and a terrible parent but had nothing to do with whether he was a molester." While defendant made a timely objection to the admission of the prior

molestation evidence involving A. in his in limine motions, he did not challenge the evidence on the basis he now contends. Consequently, the evidence of defendant's physical and psychological abuse of A. was not before the trial court when it made its pretrial ruling to admit the uncharged molestation evidence, and since defendant did not object to this evidence at trial, we will not consider his new argument on review.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.